

BOARD OF APPEALS
for
MONTGOMERY COUNTY

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APPEAL OF KAREN L. JOE

Case No. A-5648

OPINION OF THE BOARD

(Hearing held November 28, 2001)

(Effective date of Opinion: September 20, 2002)

Case No. A-5648 is an administrative appeal in which the appellant charges administrative error on the part of the Department of Housing and Community Affairs (DHCA) in the issuance of its letter determination of June 8, 2001 listing violations relating to yard debris accumulating in an in-ground swimming pool. Appellant charges error in DHCA's application of Montgomery County Code Sections 26-10(m) and 48.4. The subject property is Lot 4, Block C, Olney Square Subdivision, located at 18508 Hedgegrove Terrace, Olney, Maryland, in the R-200 zone.

A public hearing was held pursuant to Section 59-A-4.3 of the Zoning Ordinance. Karen Joe, appellant, appeared on her own behalf. Clifford Royalty, Esq., represented Montgomery County, Maryland. He called Andrew Jakab, Inspector for Code Enforcement and Housing, DHCA, as a witness.

Decision of the Board: Administrative appeal **granted**.

COUNTY'S MOTION TO DISMISS

1. Montgomery County moved to dismiss the appeal on the grounds that it was not timely filed. Montgomery County Code Sec. 26-14(b) provides that any person affected by a notice issued in connection with the enforcement of Chapter 26, Housing and Building Maintenance Standards, may appeal to the County Board of Appeals within 15 days after service is first effective (i.e., the date on which notice is received by the property owner if sent by certified mail or other method authorized by state law). [Transcript, Nov. 8, 2001 (T) at 3-4.]

2. DHCA sent a letter to appellant dated June 8, 2001, which listed violations of Chapter 26 and which required correction of the violations by July 11, 2001. [Exhibit 2.] The appellant received the letter on June 12, 2001, and filed this appeal on July 6, 2001. [T at 3-4.]

3. The letter did not contain a statement advising appellant of her appeal rights. [*Id.* at 4.] Appellant testified that she telephoned the Board of Appeals office to seek clarification, and was advised that the July 11, 2001, date represented the date by which she had to either comply or appeal. [*Id.* at 5.]

4. Montgomery County argued that, because this appeal was filed more than 15 days after appellant received the letter, the Board has no jurisdiction to hear the appeal. [*Id.*]

5. Appellant argued that an administrative agency cannot enforce an appeal period if the time limits for appeal were not clearly specified in the DHCA notice of violation. *National Institutes of Health Federal Credit Union v. Hawk*, 422 A.2d 55 (Md.App. 1980). Because the letter she received only set out a date by which she was required to abate the violations, appellant argues that the only date of which she had notice that any action was required was July 11, 2001. [*Id.*]

6. The Board requested that Montgomery County address whether the principle articulated in *Uhler v. Secretary of Health and Mental Hygiene*, 45 Md.App. 282, 412 A.2d 1287 (1980), requiring notice of an appeal right as a fundamental requirement of due process, applied in this instance. The Court of Appeals held in *Uhler* that a landowner who had received a notice ordering him to stop operating a landfill on his property had not received proper notice from the Secretary of Health and Mental Hygiene where the letter he received failed to give notice of the landowner's appeal rights.

7. Montgomery County argued that the notice in *Uhler* contained notice of a penalty that represented the deprivation of a property right, and distinguished the appeal at issue because DPS' June 8, 2001, letter simply alerted appellant to violations that needed to be corrected and did not contain a penalty. [*Id.* at 8-9.]

8. The Board expressed concern that a failure on the part of appellant to respond to the notice at issue might endanger her appeal rights in further enforcement proceedings. [*Id.* at 10.]

9. Montgomery County Code Sec. 26-14 contains no requirement that a notice of a violation of Chapter 26 also give notice of the right to appeal within fifteen days. [*Id.* at 13-14.]

10. Montgomery County Code Sec. 2A-3(d), which requires a case-by-case evaluation of substantive due process requirements. [*Id.* at 17.]

11. The Board discussed the holding of *Uhler*, that constitutional due process requirements may require notice of appeal rights even if such notice is not required by statute, and its applicability to this appeal. In *Uhler* the Court of Special Appeals observed:

The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.' Notice in a case of this kind does not comport with constitutional requirements when it does not advise the [individual] of the availability of a procedure for protesting a[n] [administrative agency's determination] as unjustified. As no such notice was given respondents despite 'good faith efforts' on their part they were deprived of the notice which was their due." . . . Notice is an especially compelling requirement in circumstances such as exist here where the order was issued . . . against a layman without knowledge of the intricacies, indeed the existence, of administrative and judicial procedures. . . [Appellant] was never told that he had important administrative and judicial remedies which could be lost by delay in exercising them, nor was he told what those rights were.

Uhler, 45 Md.App. at 287, 412 A.2d at 1290-91 (citations omitted) (quotations omitted).

12. The Board finds that, in accordance with *Uhler v. Secretary of Health and Mental Hygiene*, 45 Md.App. 282, 412 A.2d 1287 (1980), appellant was entitled to receive notice of her appeal rights as set forth in Montgomery County Code Sec. 26-14. Having made a good faith effort to ascertain her rights and having filed the appeal within a reasonable time of receipt of the notice of violations, the Board recognizes her right to sustain this appeal on the basis of constitutional due process requirements.

13. On a motion by Donald H. Spence, Jr., Chairman, seconded by Allison Ishihara Fultz with Louise L. Mayer, Donna L. Baron and Angelo M. Caputo in agreement, the Board voted to **deny** the County's motion to dismiss. [T at 17-20.]

EVIDENCE PRESENTED

1. The subject property is a single-family home at Lot 4, Block C, Olney Square Subdivision, located at 18508 Hedgegrove Terrace, Olney, Maryland, in the R-200 zone.

2. On April 20, 2001, Andrew Jakab visited appellant's property and found fallen tree branches, unregistered vehicles and an in-ground swimming pool filled with branches to within three feet of the rim. Mr. Jakab sent appellant a letter dated April 25, 2001, noting the foregoing conditions as violations of Montgomery County Code Chapter 26 and requiring her to correct the violations. Mr. Jakab stated that the branches in the pool posed a hazard because they would create a home for rodents, and because there was no fence enclosing the pool to prevent someone falling in. [T at 20-22.]

3. Mr. Jakab visited the property again on June 4 and July 19, 2001, and found that the car had been removed. He issued a letter dated June 8, 2001, [Exhibit 2], advising appellant of the ongoing hazardous condition of the plant material

accumulated in the pool. Mr. Jakab testified that the April 25, 2001 letter was sent regular mail and that the June 8, 2001 letter was sent via regular and certified mail. He testified that he received a return receipt for the certified letter. [*Id.* at 24.]

4. Mr. Jakab visited the property again in late July, 2001, and with Ms. Joe's consent took pictures of the swimming pool "filled with dirt." [Exhibit 4.]

5. Montgomery County Code Sec. 26-10(m), requires that "[e]very owner must eliminate any condition which creates a public nuisance." Mr. Jakab cited this section of the County Code in his letter of April 25, 2001. [*Id.* at 29.]

6. Mr. Jakab maintained that the conditions on the property also violated Montgomery County Code Sec. 48-24, which prohibits the storage of solid waste within the county unless otherwise provided for, and which applies to all properties, whether residential, commercial, industrial, or vacant. He had made a written notation on the list of violations attached to the June 8, 2001, letter [Exhibit 2] referring to this section of the County Code. [*Id.* at 29-31.]

7. Mr. Jakab argued that the conditions on the property constituted a public nuisance due to the combined circumstance of solid waste (branches, other plant materials) being stored in an open, unfenced swimming pool, creating both health and safety hazards. [*Id.* at 32.]

8. Mr. Jakab testified that, absent any solid waste, the pool would not constitute a public hazard, either empty or full of water, if it were fenced and the pool structure were not deteriorated. [*Id.* at 33.]

9. Montgomery County Code Sec. 48-1, which defines "solid waste" to include "all waste materials and debris, including garbage, sludge, medical pathological waste, debris from building structures, ashes, industrial waste, dead animals, salvageable waste, dead or felled tree, uprooted tree stump, slash, tree limb, bush, plant, leaves, grass, garden trimmings, street refuse, abandoned vehicles, machinery, bottles, cans . . . and any other waste materials."

10. Ms. Joe testified that the accumulation of plant material in the pool was a compost pile, not solid waste, and stated that composting is a traditional method of disposing of yard debris. She testified that her compost pile conformed with the requirements of Montgomery County Code Sec. 48-17, Disposal by Use of Compost Piles, which allows disposal of garbage only if the pile is enclosed in a rodent proof container, and which provides that compost piles consisting entirely of leaves and dirt do not require rodent proofing or other containment. [T at 40.]

11. In response to a comment by the Board that the photos taken by Mr. Jakab in July, 2001 [Exhibit 4], showed mostly branches and the photos taken in November, 2001, by appellant [Exhibit 7], showed primarily leaves, Ms. Joe stated that compost piles change over time, and that both sets of photos were accurate

representations of the compost pile at the time they were taken. The leaves had not yet fallen in July, but were almost all down and collected by November. [*Id.* at 36-39.]

12. Ms. Joe described her “cold/vintage” composting method with the aid of photographs of the pool [Exhibit 7], a guide to home composting distributed by the Montgomery County Department of Environmental Protection [Exhibit 9], and an informational bulletin prepared by the EPA [Exhibit 10]. Appellant testified that she has been composting in the pool for over ten years using the following procedure: First, she establishes a twelve inch deep base of tree limbs, grass, shredded leaves and dirt to allow air circulation at the bottom of the pile; next, yard trimmings consisting of brushwork, grass and leaves are layered over the base; as the seasons progress, a new base is laid over previous years’ material. The pile has occasionally extended up to the rim of the pool, but settles over time as the plant matter decomposes. [T at 41-48.]

13. The appellant testified that the volume of material she composts demands a base that can sustain significant weight, hence the tree limbs Mr. Jakabs observed in July. In order for the compost pile to aerate properly, air must be able to circulate underneath, as explained in Exhibit 9. [T at 42-43.] Because her compost pile is sufficiently aerated and contains nothing other than plant material, it produces no odor as it breaks down. [*Id.* at 44, 49.]

14. The appellant testified that she took core samples from the pile to illustrate that the lower layers consist of well-composted humus, proving that the composting process is occurring as intended. [*Id.* at 50.]

15. The appellant testified that the pool is not concrete, but has a dirt bottom and sheet metal sides designed to receive a vinyl pool liner. There is no liner in the pool, and all water drains naturally into the ground at the bottom. Any rust that might be observed is from the removable ladders she uses to get down into the pool when necessary. [*Id.* at 51-53.] The appellant estimated the pool’s maximum depth at 7.5 feet. [*Id.* at 44.]

16. The appellant testified that her property is fenced on one side and at the rear, is screened by a shed on one side, and by the house and a belt of trees to the front. The pool is not visible from outside the property, and it would be difficult for someone to accidentally gain access to the backyard. [*Id.* at 54-56.]

17. The appellant presented a cross-sectional diagram of the pool and accumulated compost [Exhibit 12(a)] and photographs of locations near her house with steep slopes or unprotected drops from retaining walls in publicly accessible places [Exhibit 12(b).] The appellant testified that the conditions illustrated in Exhibit 12(b) posed greater hazards than her compost pile because the drops exceeded 42 inches and because the areas were more accessible to the public than her backyard. She offered that, if the depth between the pool rim and the top of the compost heap exceeded a normal and acceptable risk, she would be willing to mitigate the situation by enclosing the pool and its associated concrete apron with a fence. [*Id.* at 57-63.]

FINDINGS OF THE BOARD

1. The Board finds that, although the definition of materials permitted in a compost pile per Montgomery County Code Sec. 48-1 includes materials contained in the definition of “solid waste” in Sec. 48-17, appellant’s use of the unlined, dirt-bottom, in-ground pool on her property to contain yard debris and other plant material meets the Sec. 48-17 allowances for a compost pile.

2. The Board finds that use of the pool to compost plant material does not constitute a health hazard likely to attract vermin because appellant’s composting method conforms to the requirements of Montgomery County Code Sec. 48-17. The Board therefore finds that appellant’s use of the pool for composting does not violate Montgomery County Code Sec. 48-24, as charged by DPS.

3. The Board finds that, because the maximum depth of the pool is estimated at 7.5 feet and because the depth of the compost pile varies over time, the pool must be enclosed by a safety fence of the type required for a private pool being used for swimming. As a result, the Board finds that DPS’ charging a violation of Sec. 26-10(m) was correct to the extent that the danger of falling into the pool constitutes a safety hazard.

The Board concludes that DPS incorrectly determined that the accumulation of branches and leaves in appellant’s pool constituted the unauthorized storage of solid waste and that, therefore, no corrective action was required. The appeal is, therefore, **GRANTED** subject to the condition that appellant install a fence no lower than 42 inches to enclose the composting area/pool.

On a motion by Allison Ishihara Fultz, seconded by Donna L. Barron, Vice Chair, with Angelo M. Caputo, Louise L. Mayer, and Donald H. Spence, Jr., Chairman, in agreement, the Board adopts the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 20th day of September, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 2-A-10(f) of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

